No. 6483

United States

Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

COVE IRRIGATION DISTRICT, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Messrs. WOOD and COOKE, of Billings, Montana,
Attorneys for Appellant and Defendant American Surety Company of New York.

Messrs. BROWN, WIGGENHORN and DAVIS, of Billings, Montana,
Attorneys for Appellee and Plaintiff. [1*]

In the District Court of the United States in and for the District of Montana.

No. 185.

COVE IRRIGATION DISTRICT, a Corporation,
Plaintiff,

vs.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, and OTTO SCHLUETER,
Defendants.

CAPTION.

BE IT REMEMBERED, that on February 3d, 1931, the plaintiff filed herein its renewal of request for findings of fact and conclusions of law, in the words and figures following, to wit: [2]

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*Page-number appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States for the District of Montana, Billings Division.

COVE IRRIGATION DISTRICT, a Corporation, Plaintiff,

vs.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, and OTTO SCHLUETER,

Defendants.

RENEWAL OF PLAINTIFF'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Comes now the plaintiff in the above-entitled action and renews its request for findings of fact and conclusions of law heretofore presented and filed in this cause at the close of the testimony, the same being as follows, to wit:

FINDINGS OF FACT.

1. That on or about September 28th, 1922, the plaintiff entered into a contract in writing with the defendants Schlueter Brothers, copy of which is attached, marked Exhibit "A," and contemporaneously therewith the defendants executed their bond in the sum of One Thousand Dollars, copy of which is attached to the complaint, marked Exhibit "B."

2. That the contract and the said bond were entered into and executed as one transaction.

3. That by the terms of said contract and said bond it was [3] intended by all the parties thereto that the defendants, Schlueter Brothers, should pay the accounts contracted for materials furnished and labor performed by persons employed by said Schlueter Brothers upon the work covered by the said contract or doing work under said contract.

4. It was intended by all of the parties that one of the conditions of said bond was that the said defendants Schlueter Brothers should pay all said accounts contracted for materials furnished and labor performed, and that if they did not pay the same, that the defendant, American Surety Company of New York, would pay and discharge the same to the plaintiff.

5. That there was a good and sufficient consideration for the said bond and the undertaking and said conditions thereof, of the defendant American Surety Company of New York.

6. That the irrigating canal and irrigation system of the plaintiff, the subject of said contract, at all times was and now is a public structure or improvement, and the improvements, enlargements, extensions and work covered by said contract was a public work and undertaking.

7. That the condition of said bond that the defendants would pay the accounts contracted for materials furnished and labor performed was expressly required by the plaintiff to protect against the chance that laborers furnishing work and materialmen furnishing material for said ditch work might be

left unpaid, without other security for their claims, and to insure that competent labor would be employed upon said work and that first class materials would be furnished for the same.

8. That the plaintiff let the said contract to the defendants Schlueter Brothers, in consideration for and upon the faith of said bond and the protection thereby afforded. [4]

9. That the defendants, Schlueter Brothers, employed certain other persons and subcontracted portions of the said work to such persons, in performance of said contract and doing the work covered thereby, after the execution of said contract and bond, and said work was so undertaken by such persons in reliance upon said contract and bond and the protection afforded thereby.

10. That one W. H. Queenan did and performed certain of the said work under such a subcontract, at the special instance and request of said Schlueter Brothers, and under his said subcontract, for the word so done, there became due and owing to the said W. H. Queenan from the said defendants Schlueter Brothers the total sum of $4,225.00, of which no part has been paid except the sum of $2,507.38, leaving a balance unpaid of $1,737.62, which sum, together with interest thereon at the rate of eight per centum per annum from February 2d, 1923, has not been paid.

11. That one J. J. Fallman did and performed certain of the said work under such a subcontract, at the special instance and request of said Schlueter Brothers, and under his said subcontract, for the

work so done, there became due and owing to the said J. J. Fallman from the said defendants Schlueter Brothers the total sum of $2,562.00, of which no part has been paid except the sum of $535.00, leaving a balance unpaid of $2,027.00, which sum, together with interest thereon at the rate of eight per centum per annum from March 1st, 1923, has not been paid.

12. That one C. F. Wickliff did and performed certain of the said work under such a subcontract, at the [5] special instance and request of said Schlueter Brothers, and under his said subcontract, for the work so done, there became due and owing to the said C. F. Wickliff from the said defendants Schlueter Brothers the total sum of $3,787.00, of which no part has been paid except the sum of $700.00, leaving a balance unpaid of $3,087.00, which sum, together with interest thereon at the rate of eight per centum per annum from March 3d, 1923, has not been paid.

13. That one John I. Kunkle did and performed certain of the said work under such a subcontract, at the special instance and request of said Schlueter Brothers, and under his said subcontract, for the work so done, there became due and owing to the said John I. Kunkle from the said Schlueter Brothers the total sum of $1,380.00, of which no part has been paid except the sum of $500.00, leaving a balance unpaid of $850.00, which sum, together with interest thereon at the rate of eight per centum per annum from December 24th, 1922, has not been paid.

14. That one Dave C. Yegen did and performed certain of the said work under such subcontract, at the special instance and request of said Schlueter Brothers, and under his said subcontract, for the work so done, there became due and owing to the said Dave C. Yegen from the said Schlueter Brothers the total sum of $1,324.00, no part of which has been paid, and that the sum of $1,324.00, together with interest thereon at the rate of eight per centum per annum from February 1st, 1923, has not been paid.

15. That one B. J. Martin did and performed under such a subcontract certain of the said work and furnished labor and materials for the same, at the special instance [6] and request of said Schlueter Brothers, and under his said subcontract; that the said Schlueter Brothers failed to perform their part of said subcontract and failed to pay the said B. J. Martin as agreed upon in said subcontract, notwithstanding frequent demands made upon them; that thereafter, without the consent of said B. J. Martin, the said defendants Schlueter Brothers or their assigns displaced the said B. J. Martin upon said work and took over the said work and the materials furnished by the said B. J. Martin upon the ground and appropriated said materials and assumed control of said work and said materials and used and placed said materials in said work and the structures covered by said subcontract, leaving the said B. J. Martin wholly unpaid, and the defendants rendered it impossible for the said B. J. Martin to complete the work undertaken by him

by said subcontract; that said labor and materials so furnished by said B. J. Martin were necessary and indispensable for the construction of the said structures so undertaken by him; that because of the foregoing facts and because of the inability of said B. J. Martin to complete said work or any portion thereof, the said subcontract furnishes no basis by which to measure the amount due him for the value of the work and materials furnished; that the said B. J. Martin elected to claim the reasonable value of said labor and materials so furnished by him as the amount due him and as the measure of his compensation; that the reasonable value of the labor performed and the labor and materials furnished and delivered by said B. J. Martin was the sum of $6,753.32, no part of which has been paid, and that the said sum of $6,753.32, together with interest thereon at the rate of eight per centum per annum from December 5th, 1922, [7] is due and owing to the said B. J. Martin from the defendants upon an account for labor and materials so covered by said bond.

16. That the said B. J. Martin also did and performed certain work, labor and services for the said defendants Schlueter Brothers upon the said ditch, as part of the work undertaken by said Schlueter Brothers under said contract, done at the special instance and request of defendants Schlueter Brothers which was of the reasonable value of $643.19, and that the said sum of $643.19, together with interest thereon at the rate of eight per centum from December 5th, 1922, is now due the said B. J.

Martin from the said defendants Schlueter Brothers as an account for labor performed under said contract, no part of which has been paid.

17. That the plaintiff fully performed its part of the said contract and delivered to the said Schlueter Brothers, or their assigns, in full payment of the said work covered by said contract, the full amount of the coupon bonds or their equivalent in money, as agreed upon; and that said payment and performance by the plaintiff was done in reliance upon the conditions in said bond and contract that said defendants Schleuter Brothers would pay for the said labor performed and materials furnished and used.

18. That all of said unpaid accounts for labor and materials come within the terms and conditions of the said bond, and payment of the same was contemplated by all of the parties to said bond as the condition thereof. [8]

19. That the said construction work contemplated by said contract has been fully completed.

20. That the defendant, American Surety Company of New York, has not paid to the plaintiff any of the said amounts of the accounts so contracted by the defendants Schlueter Brothers for materials furnished and labor performed under and by virtue of their said contract, or any part thereof.

21. That none of the issues involved in the action heretofore brought by B. J. Martin against these defendants, are involved in this action, and

the adjudication in that action in no way involved any of the issues or questions here involved.

22. That none of the issues involved in the action heretofore brought by L. S. Frantz against these defendants, are involved in this action, and the adjudication in that action in no way involved any of the issues or questions here involved.

23. That at the time of the trial of this action, neither of said actions mentioned in the last two preceding findings were pending.

24. That the defendant Otto Schlueter is a non-resident of the State of Montana, and that since the commencement of this action he could not be found within the State of Montana to serve summons upon him, notwithstanding diligent search and inquiry was made to find him within the State of Montana.

25. That at the time of the execution of the contracts of which copies are attached to the answer marked Exhibit "H" and Exhibit "I," it was the intention of the plaintiff and defendant American Surety Company of New York, acting through [9] their duly authorized representatives, that the liability of the said defendant American Surety Company of New York, under the said bond, for unpaid claims and accounts for materials furnished and labor performed, being the claims in these findings mentioned, was to be reserved and was not to be relinquished by the plaintiff or discharged or in any way to be effected by the said agreements, and that said bond should remain and continue in force, unimpaired, in so far as defendants' said liability was concerned, and the said parties understood and

agreed, and in entering into and executing those said contracts, Exhibits "H" and "I," they intended to evidence their said agreement and understanding. That the proviso contained in paragraph 4 of the contract, Exhibit "I," was inserted by the parties to effectuate that very understanding and agreement.

26. That the said agreement, Exhibit "I" has not been fully performed by the defendant American Surety Company of New York, and the said defendant has not made full payment as by it agreed, as heretofore determined by this Court in the action between the plaintiff and the defendant American Surety Company of New York, heretofore tried and adjudicated.

CONCLUSIONS OF LAW.

1. That Schlueter Brothers contracted the accounts for materials furnished and labor performed under and by virtue of said contract, set out in the foregoing findings.

2. That under the said bond and by virtue thereof, the defendant, American Surety Company of New York, became and is liable for the payment to the plaintiff of all of said unpaid accounts for said labor and materials. [10]

3. That the said contract for the alteration and construction of said ditch and the said bond should be construed as one instrument.

4. That the laborers and materialmen who furnished work and material upon said ditch work had no lien upon said work or the property of the plain-

tiff for such labor and materials performed and furnished.

5. That the said B. J. Martin had the right to waive his contract with the said Schlueter Brothers and claim the reasonable value of the labor and materials furnished by him, and that the reasonable value of such labor and materials constituted his account for materials furnished and labor performed upon said work.

6. Defendant American Surety Company of New York is estopped from questioning the plaintiff's capacity to sue in this case or to recover the penalty of said bond under the condition stated in said bond upon which this action is brought.

7. That the respective judgments in the actions of B. J. Martin against these defendants and L. S. Frantz against these defendants do not serve to bar this action or to conclude the plaintiff in this action.

8. That the contract, Exhibit "I," should be reformed to express the true intent of the parties as stated in the findings of fact.

9. That so far as the plaintiff and defendant American Surety Company of New York are concerned, the contracts, Exhibit, "H" and Exhibit "I" were entered into as a part of one transaction and should be construed together as one contract.

10. That said contracts in no way affect the liability of the defendant American Surety Company of New York under its [11] said bond for which this suit is brought.

11. That the plaintiff is entitled to recover form the defendant in this suit in the amounts as determined in the foregoing findings of fact.

The plaintiff now further requests that, in addition thereto, the Court make the following findings of fact, to wit:

9½. That one B. A. Kurk did and performed certain of the said work under such a subcontract, at the special instance and request of said Schlueter Brothers, and under his said subcontract, for the work so done, there became due and owing to the said B. A. Kurk from the said defendants Schlueter Brothers the total sum of $1,473.30 of which no part has been paid except the sum of $1911.00, leaving a balance unpaid of $562.30, which sum, together with interest thereon at the rate of eight per cent per annum from January 1st, 1923, has not been paid.

BROWN, WIGGENHORN & DAVIS,
By R. G. WIGGENHORN,
Attorneys for Plaintiff.

Personal service of the foregoing renewal of plaintiff's request for findings of fact and conclusions of law made and admitted and the receipt of a copy thereof acknowledged this 3d day of February, 1931.

WOOD & COOKE.
By STERLING M. WOOD.

Filed Feb. 3, 1931. [12]

THEREAFTER, on February 12, 1931, the court made the following order on said request for findings of fact and conclusions of law:

ORDER ADOPTING AND APPROVING REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The within findings of fact and conclusions of law by plaintiff and objections thereto by defendant, American Surety Company, having been filed and duly submitted to the Court in the within action, and the Court being duly advised, and good cause appearing therefor from the law and the evidence according to the mandate of the Circuit Court of Appeals, IT IS ORDERED that the within findings and conclusions be, and the same are hereby adopted, approved and made as and for the findings of fact and conclusions of law by the court, with the exception of findings numbered 10, 11 and 12, which are hereby modified to conform to objections by defendant numbered 2, 3, and 4; otherwise and in other respects the objections by defendant are overruled and denied.

Dated Billings, Mont., Feb. 12th, 1931.

CHARLES N. PRAY,
Judge. [13]

THEREAFTER, on February 18th, 1931, judgment was duly rendered and entered herein, in the words and figures following, to wit:

(Title of Court and Cause.)

JUDGMENT.

This cause came on regularly for trial to the Court, a jury having been expressly waived by written stipulation of the parties on file herein. Messrs. Brown, Wiggenhorn & Davis appeared as counsel for the plaintiff and Messrs. Wood & Cooke, as counsel for the defendant, American Surety Company of New York, a corporation. Evidence on behalf of both parties was introduced, and the evidence being closed, judgment was entered in favor of said defendant, American Surety Company of New York, a corporation, that plaintiff take nothing in this cause. Upon appeal by the plaintiff from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, the said judgment was reversed and by a decree of said Court of Appeals the said cause was remanded to this court with directions to take further proceedings not out of harmony with the opinion of said Court of Appeals. On December 8th, 1930, the mandate of said Court of Appeals, upon such reversal, issued to this Court, which said mandate is now on file in this cause. Whereupon in obedience to said decree of said Circuit Court of Appeals and the opinion in support thereof and the mandate of said Court, this court has made its findings of fact and conclusions of law in favor of the plaintiff and against the said defendant, American Surety Company of New York, a corporation, upon the evidence submitted at the trial.

WHEREFORE, by reason of the law and the premises aforesaid,—

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff do have and recover from the defendant, American Surety Company [14] of New York, a corporation, the sum of Seventeen Thousand Nine Hundred Sixty-three and 72/100 Dollars ($17,963.72) Dollars, with interest from the date hereof at the rate of eight per cent per annum, and its costs of suit herein expended, taxed at the sum of $114.25.

Judgment entered February 18th, 1931.

CHARLES N. PRAY,
Judge of the Above-entitled Court.

Filed and entered Feb. 18, 1931. [15]

THEREAFTER, on March 31, 1931, a motion to modify judgment was duly filed herein, being in the words and figures following, to wit:

(Title of Court and Cause.)

MOTION TO MODIFY JUDGMENT.

Comes now the defendant, American Surety Company of New York, a corporation, in the above-entitled action, by and through the undersigned its attorneys, and moves the Court as follows, to wit:

To modify the judgment of February 18th, 1931, in said action and the findings upon which the said judgment was based by eliminating therefrom all

interest allowance upon the claims of the subcontractors, Fallman, Wickliff, Kunkle, Yegen, Martin and Kurk, prior to the making of the findings in said action, thereby reducing the amount of the said judgment to $10,870.40 plus interest thereon from the date of the Court's findings, and plus the taxable costs.

This motion is made and based upon the records and files in the above-entitled action, and particularly upon the bill of exceptions therein filed setting forth the evidence and other proceedings had at the trial of the said action.

Dated this 25th day of March, A. D. 1931.

WOOD & COOKE,
By STERLING M. WOOD,
Attorneys for Defendant American Surety Company of New York.

Filed March 31, 1931. [16]

THEREAFTER, on May 7th, 1931, the court made the following order on said motion to modify judgment, to wit:

(Title of Court and Cause.)

ORDER DENYING MOTION TO MODIFY JUDGMENT.

This cause heretofore submitted to the Court on the motion of defendant for modification of the judgment herein came on regularly this day for decision. Thereupon, after due consideration, Court

ORDERED that said motion be and the same is denied.

Entered in open court May 7, 1931.

C. R. GARLOW,
Clerk. [17]

THEREAFTER, on May 14, 1931, the petition for appeal and order allowing the same were duly filed and entered, being in the words and figures following, to wit:

(Title of Court and Cause.)

PETITION FOR APPEAL AND ORDER ALLOWING SAME.

To the Honorable CHARLES N. PRAY, One of the Judges of the Above-named Court:

American Surety Company of New York, a corporation, your petitioner, who is the defendant in the above-entitled action, feeling itself aggrieved by the judgment and order hereinafter referred to, prays that it may be permitted to take an appeal from the judgment entered in the said action on the 18th day of February, 1931, and from the order entered in the said action on the 7th day of May, 1931, denying the said defendant's motion to modify the aforesaid judgment, to the United States Circuit Court of Appeals for the 9th Circuit, for the reasons specified in the assignment of errors which is filed herewith.

And your petitioner desires that said appeals shall operate as a supersedeas and therefore prays

that an order may be made fixing the amount of security which the said defendant shall give and furnish upon such appeals, and that upon giving such security all further proceedings in this court be suspended and stayed until the determination of said appeals by the Circuit Court of Appeals for the 9th Circuit.

Dated this 14th day of May, A. D. 1931.

STERLING M. WOOD,

Attorney for American Surety Company of New York, a Corporation, Defendant.

The foregoing petition is hereby granted and the appeals therein prayed for are allowed, and upon petitioner filing a bond in the sum of $500 with sufficient sureties, and [18] conditioned as required by law the same shall operate as a *supersedeas* of the judgment made and entered in the above-entitled action upon the 18th day of February, 1931, and shall suspend and stay all further proceedings in this court until the determination of such appeals by the Circuit Court of Appeals for the 9th Circuit.

Dated May 14th, 1931.

CHARLES N. PRAY,

District Judge.

Filed May 14, 1931. [19]

THEREAFTER, on May 14, 1931, an assignment of errors was duly filed herein, as follows, to wit:

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Comes now the American Surety Company of New York, a corporation, the defendant in the above-entitled action, and files the following assignment of errors upon which it will rely in the prosecution of the appeals herewith petitioned for in said action from the judgment of this Court entered on the 18th day of February, 1931, and from the order dated May 7th, 1931, denying its motion for a modification of the said judgment.

The Court erred:

1. In the making and entry of its said judgment bearing date of February 18th, 1931, in that (a) the said judgment is contrary to law, and, (b) the said judgment is not supported by the record in said action, and, (c) the findings upon which the said judgment is based are contrary to law and without evidence to sustain them as to the interest allowed prior to judgment.

2. In the denial of the motion of the defendant to modify the aforesaid judgment by the elimination therefrom of the interest allowed prior to judgment, in that the claims sued upon were each and all unliquidated prior to the findings of the Court and the entry of the said judgment.

WHEREFORE, defendant prays that the said judgment and the said order denying the modification of the same may be reversed and that the District Court of the United States for the District

of Montana be directed to enter such judgment as the [20] United States Circuit Court of Appeals for the *United States* shall deem meet and proper on the record.

STERLING M. WOOD,
Attorney for Defendant American Surety Company of New York, a Corporation.

May 14th, 1931.

Filed May 14, 1931. [21]

THEREAFTER, on May 14, 1931, a bond on appeal was duly filed herein, as follows, to wit:

(Title of Court and Cause.)

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that American Surety Company of New York, a corporation, as principal, and New York Casualty Company, a corporation, as surety, are held and firmly bound unto the above named plaintiff, Cove Irrigation District, a corporation, in the sum of $500.00 for the payment of which well and truly to be made we bind ourselves, jointly and severally, and each of our successors and assigns, firmly by these presents.

Sealed with out seals and dated this 14th day of May, A. D. 1931.

WHEREAS, the above-named American Surety Company of New York, a corporation, has prosecuted an appeal to the United States Circuit Court

of Appeals for the 9th Circuit to reverse a judgment made and entered in the above-entitled action on the 18th day of February, 1931, and an order dated May 7th, 1931, denying the motion of the said American Surety Company of New York, a corporation, as defendant in the above-entitled action, to modify the aforesaid judgment,—

NOW, THEREFORE, the condition of this obligation is such that if the said American Surety Company of New York, a corporation, shall prosecute the said appeal to effect and shall answer all damages and costs that may be awarded against it if it fails to make good its plea and will in that event comply with all the terms and conditions of the said judgment, then the above obligation to be void; otherwise to remain in full force and virtue.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
By STERLING M. WOOD,
Its Attorney. [22]

NEW YORK CASUALTY COMPANY, a Corporation.
By STERLING M. WOOD,
Its Attorney-in fact.

The foregoing bond on appeal is hereby approved this 14th day of May, 1931.

CHARLES N. PRAY,
District Judge.

Filed May 14, 1931. [23]

THEREAFTER, on May 14, 1931, a citation was duly issued herein, which original citation is hereto annexed and is in the words and figures following, to wit: [24]

(Title of Court and Cause.)

CITATION ON APPEAL.

United States of America to Cove Irrigation District, a Corporation, and to Messrs. Brown, Wiggenhorn & Davis, Its Attorneys, GREETINGS:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, State of California, within thirty (30) days from date hereof, pursuant to an order allowing an appeal, filed and entered in the Clerk's office of the District Court of the United States for the District of Montana, from a judgment made and entered on the 18th day of February, 1931, and from an order made upon the 7th day of May, 1931, denying the motion of the above-named defendant for a modification of the said judgment, in that certain action at law wherein American Surety Company of New York, a corporation, is defendant and appellant, and you are plaintiff and appellee, to show cause, if any there be, why the judgment rendered against the defendant American Surety Company of New York, a corporation, and the order denying the motion of the said American Surety Company of New York, a corporation, to

modify the said judgment, as in said order allowing the appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf. [25]

WITNESS the Honorable CHARLES N. PRAY, Judge of the United States District Court for the District of Montana, this 14th day of May, A. D. 1931.

CHARLES N. PRAY,
District Judge.

Due service of the within and foregoing citation on appeal and receipt of true copy thereof acknowledged this 16th day of May, 1931.

BROWN, WIGGENHORN & DAVIS,
By R. G. WIGGENHORN,
Attorneys for Plaintiff. [26]

Filed May 22, 1931. [27]

THEREAFTER, on May 22d, 1931, a praecipe for transcript of record was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-named Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the 9th Circuit, pursuant to the appeal allowed in the above-entitled action, and to include in such transcript of record the following, and no other, documents, to wit:

1. Request of Cove Irrigation District for findings of fact and conclusions of law, dated February 1931.

2. Judgment dated February 18th, 1931.

3. Motion of American Surety Company of New York to modify the said judgment of February 18th, 1931.

4. Minute order denying the motion of American Surety Company of New York to modify the judgment of February 18, 1931.

5. Petition of American Surety Company of New York dated May 14th, 1931, for appeals, and order allowing the same.

6. Assignment of errors in connection with the foregoing petition for appeals.

7. Bond on appeal dated May 14th, 1931.

8. Citation on appeal dated May 14th, 1931, with acknowledgment of service thereof.

9. This praecipe with acknowledgment of service thereof.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the 9th Circuit, and to be filed in the office of the Clerk of the said Circuit Court of Appeals at San Francisco, California, on or before the 10th [28] day of June, 1931.

A transcript of the pleadings in this action and of the proceedings had at the trial of the same was prepared by your office under date of June 11, 1929, in connection with a previous appeal herein, and was duly filed in the Circuit Court of Appeals for the 9th Circuit upon the 17th day of June, 1929, as

Cause No. 5861, upon the docket of that court. Therefore, this praecipe directs you to prepare a transcript of such further record and proceedings in said action as are necessary, with the record and proceedings previously prepared, to provide the said Circuit Court of Appeals for the 9th Circuit, with a complete transcript of the record and proceedings in said action.

Dated this 21st day of May, A. D. 1931.

WOOD & COOKE,
By STERLING M. WOOD,
Attorneys for American Surety Company of New York, the Appellant Herein.

Service of above praecipe accepted and acknowledged this 21st day of May, 1931.

BROWN, WIGGENHORN & DAVIS,
By R. G. WIGGENHORN,
Attorneys for Cove Irrigation District, the Appellee Herein.

Filed May 22, 1931. [29]

(Title of Court.)

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Cir-

cuit, that the foregoing volume consisting of 29 pages, numbered consecutively from 1 to 29 inclusive, is a full, true and correct transcript of the portions of the record in the within entitled cause designated by praecipe filed, as appears from the records and files of said court in my custody as such Clerk; and I do further certify that I have annexed to said transcript and included in said pages the original citation issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of Sixteen & 75/100 Dollars ($16.75), and have been paid by the appellant.

WITNESS my hand and the seal of said court at Great Falls, Montana, this 29th day of May, A. D. 1931.

[Seal] C. R. GARLOW,
Clerk as Aforesaid. [30]

[Endorsed]: No. 6483. United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company of New York, a Corporation, Appellant, vs. Cove Irrigation District, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed June 1, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.